IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Appeal No. 414 of 2007
in
Notice of Motion No.301 of 2006
in
Sum Suit No.5279 of 1998

Mr Sunil Mehra
of Mumbai Indian Inhabitant
residing at 9, Bay View Malabar Hill
Mumbai 400006, and carrying on
business in the name and style of X.L
Marketing as its proprietor at
Harichand Compound, LBS Marg
Vikhroli West, Mumbai 400079 ..Appellant.

Vs

Mr Rajinder Singh Gulati
of Mumbai, adult, Indian Inhabitant
residing at B 11/1 Maitri Park
S.T.Road, Chembur, Mumbai 400071 ..Respondent

Mr M.M. Vashi for the Appellants
Mr. G.T Kukreja with Mr R.P.Lambay i/b M/s Kukreja & Co
for respondent.

CORAM: SWATANTER KUMAR,C.J.,&
DR D.Y. CHANDRACHUD, J.

Judgment reserved on 8.10.2007
Judgment pronounced on 26.10.2007

JUDGMENT(Per Swatanter Kumar, C.J.):

The plaintiff-respondent in the present appeal filed a suit for recovery of Rs.12 lacs from the defendant-appellant. The suit for recovery was based on the averment that the defendant-

appellant herein had expressed his desire to induct the respondent as a partner in his firm upon his contributing Rs.13.50 lacs as capital and equal amount was to be contributed by the defendant. The plaintiff contributed the said amount on 6th January 1997. However, the defendant did not contribute his capital investment on the ground that money was not readily available with him. In May 1997 the appellant stated that he had no funds. The respondent expressed his desire not to be inducted as partner in the sole proprietorship business under the name and style of X.L. Marketing and requested for refund of the amount of Rs.13.50 lacs. The appellant did not refund the money but by a letter of confirmation dated 15th May 1997 confirmed the debt and agreed to pay the said amount in terms of the said letter, copy of which was annexed to the plaint at Exhibit “B”. The plaintiff's house was burgled and amongst various articles, the original confirmation receipt was also stolen. A report with the police was lodged. Despite the fact that the defendant has agreed to repay the amount within one month as he was to sell one of his properties, he did not pay the same. However, by post dated cheques the defendant made payment of Rs.1.50 lacs to the plaintiff during the period 19th

July 1997 and 11th October 1997, but the balance amount of Rs.12 lacs was not paid despite the commitments made by the defendant. Thereafter, placing the above facts on record, in the letter dated 14.9.1998 the plaintiff demanded the said amount from the defendant. Even notice through counsel was sent by the plaintiffon 16th October 1998 which was duly received. Vague reply was received on 26th October 1998 by the plaintiff stating that the amount was not due. On these facts the plaintiff filed the suit under the provisions of Order 37 of the Code of Civil Procedure and prayed for a decree for Rs.12 lacs with interest at the rate of 18% p.a. from the date of filing of the suit till payment.

2. The suit was contested by the defendant. However, during the pendency of the suit the parties are stated to have arrived at a settlement wherein the appellant agreed to pay the decretal amount in installment of Rs.1 lac. It was also stated in clause 3 of the terms of settlement that in the event of any default the entire decretal amount shall become recoverable. It was the case of the respondent that the appellant committed two defaults, one on 7th November 2005 and the other on 7th

December 2005. With an intention to pray for condonation of default, the appellant took out a notice of motion being Notice of Motion No.301 of 2006 and accept cheques of installments as per the agreed terms. This notice of motion was opposed by the respondent who stated that the Court was not vested with power to extend the time for payment of installment without the consent of the respondent. However, according to the appellant the Court has power to extend the time for payment of installments in terms of Order 20 rule 11(2) of CPC.

3. The learned single Judge held that the Court had no power to extent the time without the specific consent of the respondent. Resultantly, and in view of the fact that there was breach of the agreed terms and installment was not regularly paid on or about 7th of each month, the Court declined the relief to the appellant and rejected the notice of motion. This order dated 13th March 2007 has been impugned by the appellant in the present appeal.

4. The question that falls for consideration in this appeal is whether or not the court has power to extend the time

for payment of installment, despite the objection or without consent of the respondent-decree holder? Another essential but ancillary question that the Court has to dwell upon in the facts and circumstances of the case is whether the decree passed by the court was a decree on admission as contemplated under Order 12 rule 6 of the Code or was a decree in terms of the Order 23 of the Code.

5. As is evident from the impugned order the learned Single Judge held that the provisions of section 148 of the Code were not attracted. Relying upon the judgment of the Supreme Court in the case of Hukumchand vs Bansilal AIR 1968 SC 86, it was held that the court would not rewrite a contract between the parties but the court would relieve a party against a forfeiture clause and where the contract of the parties has merged in the order of the court, the court' sfreedom to act to further the ends of justice would surely not stand curtailed. Further the learned Single Judge found that it was a consent decree and the time schedule provided in the decree was binding on the party and the time could not be extended ordinarily not for mere asking as the court can not rewrite the

contract between the parties. It will be useful to refer to the following findings recorded by the learned single Judge in the impugned order:

> "As pointed out earlier, time cannot be extended by exercising power under sub-rule 2 of Rule 11 of Order XX of the said Code. As held by the learned single Judge in case of Durga Joshi (supra), in the facts of this case section 148 or section 151 cannot be invoked for extending the time as it is not permissible to alter the decree on the ground of equity. This is not a case where relief is sought against a penalty or forfeiture. The plaintiff has granted a concession to the defendant to pay a lesser amount by installments. In this case there is no penalty or forfeiture provided in the decree.
>
> Again turning back to the facts of the case, even going by the chart annexed at Exh A I, the defendant never paid installments on or before 7th day of every calendar month. Moreover, there is clear default for the last two months i.e November and December 2005. Apart from this fact, it is very difficult to accept the submission that the defaults were condoned by the plaintiff. The fact remains that there is a clear default in making payment of installments of last two consecutive months. Reliance placed on order dated 13th February 2006 will not help the defendant as the observations made therein are for a limited purpose of considering the prayer for ad-interim relief.
>
> In this view of the matter, the prayer for extension of time cannot be acceded to and the notice of motion is accordingly dismissed."

6. Before we proceed to examine the merits of the contentions raised by the parties before us and in the light of the findings recorded by the learned Single Judge in the impugned order, it will be appropriate to refer to the minutes agreed between the parties and the consent decree passed by the court. It appears from the record that the parties and their counsel on 8th October 2004 had prepared and signed the consent terms. However, they were described as "Minutes of the decree on admission", which read as under:

> "IN THE HIGH COURT OF JUDICATURE AT BOMBAY
> ORDINARY ORIGINAL CIVIL JURISDICTION
> SUMMONS FOR JUDGMENT NO. 277 OF 2004
> in
> Summary Suit No 5279 of 1998
> (Under order XXXVII Rule 2 of C.P.C. 1908)
> Mr. Rajinder Singh Gulati .. Plaintiff
> vs
> Mr Sunil Mehra ..defendant
>
> MINUTES OF DECREE ON ADMISSION
>
> 1) Decree on admission for Rs.12,00,000.00 with interest on Rs.12,00,000.00 @ 18% p.a. from the date of filing of the suit till payment and cost of the suit against the defendant and in favour of the plaintiff.
>
> 2(a)In the event of the defendant paying to the plaintiff a sum of Rs.12,00,000.00 (Rupees twelve lacs only) by monthly installment of Rs.1,00,000.00

as mentioned in clause 2(b) below, then and in that event only the decree to be marked fully satisfied.

2(b) The first installment of Rs.1,00,000.00 shall become due and payable on or before 7.4.2005 and the subsequent monthly installment of Rs.1,00,000.00 shall become due and payable on or before the seventh day of each succeeding month thereafter without committing any two defaults or last default.

2) In the event of the defendant committing any two defaults or the last default in payment of Rs.12,00,000 by monthly installment of Rs.1,00,000.00 as aforesaid, then and in that event, the plaintiff shall be at liberty to execute the decree for the entire decretal amount or the balance thereof remaining due and payable as mentioned in clause (1) above.

3) 2/3rd of the institution fees be refunded to the plaintiff.

Dated this 8th day of December 2004".

On the basis of these minutes the Court passed the following order dated 8th December 2004:

"The matter is on board for filing consent terms. Advocates for the plaintiff and defendant are present. They file decree on admission duly signed by the plaintiff, defendant and their respective advocates. The decree on admission is taken on record and marked "X" for identification. Undertaking if any, is accepted. The suit along with summons for judgment is disposed of accordingly in view of the decree on admission. No

> order as to cots. Refund of court fee, if any, as per rules. Certified copy expedited."

The Court had not only passed a decree in terms of the consent terms as recorded in the opening line of the order but had also, after marking the said terms as "X", accepted the undertakings. In other words, what the appellant had undertaken to comply with, that is, payment in instalments without default to take the benefit, was also, accepted by the Court.

7. The above events show that the parties to the suit had prepared the minutes which would safely be termed and described as "consent terms" without any intervention of the court. As is evident from the agreed terms that the decree for Rs.12 lacs with interest at the rate of 18% p.a was passed in favour of the respondent and against the appellant but the decretal amount would stand satisfied if the sum of Rs.12 lacs is paid by bimonthly installment of Rs.1 lac each.

8. The consequence of default as provided in the agreement was that the respondent would be entitled to secure the entire decretal amount with interest which otherwise could

be satisfied by just making the payment of Rs. 12 lakhs as per the agreed terms. The argument advanced on behalf of the appellant that this is a decree on admission as contemplated under Order 12 Rule 6 of the CPC is based on misconception of law. Under this provision, the Court may at any stage of the suit, either on the application of any party or of its own motion and without waiting for the determination of any other question between the parties, give judgment, having regard to the admission of a fact either in pleadings or otherwise. This is a power vested in the Court and does not dependent upon the consent of the parties. In the event, there is an admission of a fact, like of the amount due, on the pleadings or otherwise, on any document, etc. on the file of the Court, the Court can pass a decree. The foundation of such a decree is admission of a party and not consent of the parties. The Court would have to pronounce upon a judgment, whether a fact is admitted or not and, if admitted, to what extent and on what scope is the controversy, while passing a decree upon admission. None of these ingredients are required to be satisfied when a decree is passed by the Court on the joint request of the parties where the parties require a consent decree to be passed in terms of

Order 23 Rule 3 of the CPC. The parties are required to submit in writing an agreement or the terms and conditions of compromise by which they settle whole or any part of the suit claim and such an agreement or compromise should be lawful and the Court has to record its satisfaction in regard to those ingredients. Consent/agreement in writing between the parties is a condition precedent to invocation of the jurisdiction of the Court under Order 23 Rule 3 of the CPC. The agreement between the parties should neither be void nor voidable under the Indian Contract Act and it has to be a lawful agreement. It is the agreement between the parties which results in passing of a decree under Order 23 while in contradistinction thereto under Order 12 Rule 6, no consent of parties would be required by the Court to pass a decree. This distinction is determinative in this regard and different consequences will follow on the basis of a decree by consent and a decree on admission.

9. The learned counsel appearing for the appellant led some emphasis on the provisions of Order 20 Rule 11 of the CPC to argue that the Court ought to have allowed the Notice of Motion taken out by the appellant for permission to make

payment of the instalments in terms of the compromise despite the default. Order 20 Rule 11 reads as under:

> "**11. Decree may direct payment by instalments.-**
>
> (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient reason incorporate in the decree, after hearing such of the parties who had appeared personally or by pleader at the last hearing, before judgment, an order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.
>
> **Order, after decree, for payment by instalments._**
>
> After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree-holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or otherwise, as it thinks fit."

10. The Legislature has dissected this provision into two different stages. Sub-rule (1) comes into operation when the Court is to pass a decree. The Court may, for any sufficient cause and reasons, permit the payment of the amount decreed by installments and subject to such terms in relation to interest installments. However, sub-rule (2) operates post

decree payment of installments. After the passing of the decree, the Court may, on an application of the judgment-debtor and with the consent of the decree holder, order that payment of the amount decreed shall be postponed or be made by installments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, as the Court may thinks fit. Obviously, in the present case, sub-rule (1) has no application. Examining the provisions of Order 20 Rule 11 (2), it is clear that the consent of the decree holder would be necessary.

11. A Full Bench of this Court in the case of *Waman Vishwanath Bapat* vs. *Yeshwant Tukaram,* AIR (36) 1949 Bombay 97, held that a mortgage decree passed on award was made payable by certain fixed installments on or before the fixed dates. There was a default clause which was to operate on the failure to pay any two installments . When the judgment debtor having committed the defaults, the decree holder filed an application for sale of the mortgaged property and recovery of the entire amount including the penalty. The judgment debtor prayed for liberty to pay the installments and

upon acceptance of the amount he should be relieved against the breach he had committed in payment of the installments on their respective due dates. The Civil Judge, Senior Division, in that case, took the view that the judgment debtor should be relieved against the penalty subject to the conditions stated in the order. After discussing different views on this aspect, the Full Bench held as under.-

> "There are two conflicting views which have been taken by this Court on this question and the two protagonists of these two views are Sir John Beaumont and Sir Norman Lacleod, two learned Chief Justices of this Court. Sir John Beaumont in *Burjorji Shapurji v. Madhavlal Jesingbhai*, 58 Bom. 610 (AIR (21) 1934 Bom. 370) was considering a case where a certain amount was made payable under the decree and it was provided that if a certain amount was paid on the dates specified, then satisfaction was to be entered up. In default of payment on the due date, the full amount under the decree became payable. The judgment-debtor failed to pay the smaller amount on the due date and the decree-holder applied for execution and the question arose whether the delay in payment on the due date should be condoned and Sir John Beaumont took the view that what the decree-holder had done was to have made a concession to the judgment-debtor, the concession being that if he paid the smaller amount by a particular date, full satisfaction would be entered up, but in default of payment on the due date the amount actually due under the decree would become payable, and the learned Chief Justice took the view that the provision for the payment of the full amount in default of payment of the smaller amount on the due date was not in the nature of a penalty and

the Court could not relieve against the breach committed in the failure to pay the amount on the due date. At p. 617 the learned Chief Justice sets out the law which he says is not open to any serious question and what he says is this:

> "If there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date a larger sum shall be paid, that condition is in the nature of a penalty against which a Court of equity can grant relief and award to the party seeking payment only such damages as he has suffered by the non-performance of the contract. But if, on the other hand, there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, or payment by installments, by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing."

6. In this case also the decree provides for the payment of a particular sum. It proceeds to confer a concession upon the debtor, *viz*. If he pays the decretal amount by certain installments, then he need not pay the full decretal amount at once. But if he fails to pay those installments on their respective due dates, then the concession disappears and he is under an obligation to pay the full amount and what we are now asked by the Government Pleader to do is to relieve the judgment-debtor from his obligation to pay the installments on their respective due dates, he having obtained the concession as a result of undertaking that obligation.

7. Sir John Beaumont also considered the same question in an unreported judgment, *Pari Chimanlal Dholidas v.* Chimanlal Bhudardas Shah, First Appeal No. 244 of 1939, decided by Beaumont C.J. And Sen J. on 29th November, 1940. There he points out that there is no general power in Courts of equity to disregard agreements which it thinks unjust and he also points out that at the present time the rules of equity are almost as well settled as rules of the common law and he sounds a note of warning that more harm than good would be done by allowing Courts to interfere with agreements made between the parties merely because the Court may think a particular agreement unfair. The principle enunciated by him applies not only to consent decrees but also to decrees passed by the Court *in invitum*. Whereas in the case of a consent decree, it is the question of the sanctity of contract, in the case of a decree it is the question of a solemn adjudication by the Court of the rights of parties.

11. A point has also been urged as to whether the decree-holder waived the breach by accepting payments. The facts show that from 1938 till 11th October, 1943, the decree-holder accepted payments from time to time from the judgment-debtor. On the default having taken place admittedly the whole decretal amount became due and payable and there is nothing to show on the record that the decree-holder accepted these payments not towards what was due to him under the decree but in waiver of the breach committed by the judgment-debtor. As a matter of fact, the learned Judge below has found as a fact that these payments were not accepted as a waiver of the decree-holder's rights and we see no reason to differ from that finding of fact. “

12. The Patna High Court in the case reported in the case of Birendra Prasad Sukul and ors vs Surendra Prasad Sukul and ors, AIR 1956 Pat 209 took the view that after the passing of the decree the Court can pass an order under sub-rule (2) only if the decree holder gives his consent thereto. A single Bench of this Court in the case of *Durga Mohan Joshi* vs. *International Metal Industries and others*, AIR 1984 Bom 314, also took the view that sub-rule (2) empowers the Court to grant installments or vary the same. Such power can be exercised by the Court at a subsequent date of the passing of the decree, only with the consent of the decree holder.

Even in the case of *Prithvichand Ramchand Sablok* vs. *S.Y. Shinde,* AIR 1993 SC 1929, the Supreme Court clearly stated the principle that duty of the Court is to see that the consented terms being consistent with relevant laws and where the Court has recorded that certain concession was obtained by the judgment-debtor, the decree should be executed as a consent decree in its entirety.

13. In the case of *Gupta Steel Industries* vs. *Jolly Steel Industries Pvt. Ltd. and another* [(1996) 11 SCC 678], the

Supreme Court affirmed the principle that a compromise decree under Order 23 Rule 3 cannot be interfered with or modified by Court unless parties agree to the same. The Supreme Court noticed in paragraph 6 of the judgment that High Court was obviously incorrect in interfering with and modifying the consent decree unless the parties agree for the same.

14. The reliance placed by the learned counsel for the appellant upon the judgment of this Court in the case of *Marketing and Advertising Associates Pvt. Ltd.* vs. *Telerad Private Ltd.,* AIR 1969 Bom 323 is of no help as that judgment has no application to the facts of the present case. There the Court was primarily concerned with the scope of Section 148 of the CPC regarding the power relating to extension of time fixed by a consent order. In paragraph 4 of that judgment, the Court noticed that it was neither a final order nor in the nature of a conditional decree and thus the Court retained the power to extend the time. In our considered view, the judgment of the learned single Judge of this Court thus has no application to the facts of the present case.

15. It is amply clear from the aforenoticed facts that the appellant had taken an advantage/concession in terms of the compromise decree which was passed by the Court in furtherance to the agreement between the parties dated 8th December, 2004. Admittedly, the appellant has committed default and he is liable to face the consequences of the default by which the entire decretal amount has become due and payable giving right to the respondent to execute the decree as such. The Court has rightly rejected the plea of the appellant for grant of extension and consequent acceptance of installments despite default. The Court could only alter the terms and conditions agreed between the parties by consent of the parties and not on a unilateral plea taken by the appellant. Merely because the agreed terms were titled as “Minutes of decree on admission” would not change the substance of the document. As already noticed, the minutes of the decree dated 8th December, 2004, were result of negotiations between the parties and were recorded without intervention of the Court. This was a document executed by the parties and signed by their respective counsel by way of an agreement settling all the disputes in the subject matter of the suit. This agreement

provided different terms and conditions including the consequences of default. It is categorically stated that in the event the appellant failed to pay to the respondent a sum of Rs. 12 lakhs by monthly instalments of Rs. One lakh in terms of clause 2(b), then the entire decretal amount of Rs. 12 lakhs with interest at the rate of 18 per cent per annum from the date of filing of the suit till payment and costs would be satisfied. It was for the appellant to pay the amount without default to take advantage of the compromise. Having committed defaults, he essentially must bear the consequences as agreed between the parties. After detailed discussions, the learned single Judge has rightly come to the conclusion that the request of the appellant for grant of extension could not be acceeded to and the Notice of Motion was accordingly dismissed. We are unable to find any error of law or jurisdiction in the approach of the learned single Judge and resultantly dismiss this appeal, being without merit.

Appeal is accordingly dismissed, leaving the parties to bear their own costs.

CHIEF JUSTICE

DR.D.Y.CHANDRACHUD,

J.